Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LLOYD LIGHTNER
Petitioner,

V.

THE STATE OF ALABAMA
Respondent.

On Petition for a Writ of Certiorari to the
Alabama State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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June 1, 2010

QUESTION PRESENTED

Whether the Houston County Circuit Court erred in allowing evidence to be admitted even though the State did not lay a foundation for the expert witness and in essence denying the petitioner his Fourth Amendment right to not be subjected to illegal search and seizures?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Supreme Court of Alabama.

The Petitioner here and appellant below is William Lloyd Lightner.

The Respondents here and appellees below are the State of Alabama, Troy King - Attorney General, Jean A. Therkelsen – Assistant Attorney General.

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THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER IT IS A VIOLATION OF THE FOURTH AMENDMENT IF EVIDENCE OBTAINED THROUGH THE USE OF A DRUG DOG IS ADMITTED WITHOUT THE STATE LAYING A FOUNDATION AS TO THE HANDLER'S EXPERTISE PRIOR TO THE EVIDENCE BEING ADMITTED. 4

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Max A. Hansen, *United States v. Solis, Have the Government's Supersniffers Come Down with a Case of Constitional Nasal Congestion?*,
13 San Diego L. Rev. at 416.

OPINIONS BELOW

The copy of the opinion of the appellate court is attached to this petition which shows the Court of Criminal Appeals case to be CR-08-1471. Additionally, a copy of the Order overruling the Petitioner's Application for Rehearing is attached.

JURISDICTION

The State of Alabama Court of Criminal Appeals issued its opinion on December 11, 2009. The State of Alabama Court of Criminal Appeals entered its order denying rehearing on January 8, 2010. The Supreme Court of Alabama entered a judgment of writ denied on March 5, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Circuit Court jurisdiction. The court of first instance, the Circuit Court of Houston County, Alabama had jurisdiction of this matter pursuant to § 15-2-2, Ala. Code 1975.

Factual Background. On or about May 27, 2007, Petition was pulled over after exiting the parking lot of a club in the 200 block of North Foster Street, Dothan, Alabama by officer Jamie Henderson of the Dothan Police Department. Officer Henderson testified that he observed him recklessly accelerating

his vehicle before pulling out of the parking lot. Officer Henderson then states that he pulled out after him and after turning down a street or two pulled him over by turning on his emergency lights. He testified that the Petitioner did not speed, lose control of his car, wave or give any indication that there existed any problem with his operation of the vehicle. Although the officer said he pulled him over for the high acceleration of vehicle. Officer Henderson never testified as to the circumstances of the acceleration. Further, if he had accelerated while driving in the small confines of the parking lot would not the tires had squealed, left rubber marks or at least fishtailed. Officer Henderson states that none of the above suppositions occurred. Upon pulling the Petitioner over, Officer Henderson asked for his driver's license and insurance card and Petitioner handed those requested documents to him. Officer Henderson testified that while obtaining documentation, he observed a pill bottle on the passenger seat that Petitioner seemed to be trying to cover up with his hand. Henderson did not ask for consent to search the vehicle or request to see the pill bottle that was in plain view. Instead, he testified that he went back to his patrol car and brought his canine unit to Petitioner's vehicle to determine the presence, if any, of illegal contraband based on the presence of the pill bottle that he states was not illegal to have. Henderson testified that he walked his canine (no name of canine was given) around the Petitioner's vehicle twice and the canine unit

indicated two times that there was drugs near the driver's door which prompted Officer Henderson to search the vehicle. This process took less than 5 minutes. Officer Henderson testified that his canine partner was a passive indicator, in other words he would sit down when he determined that there was an indication of drugs. Instead of being an aggressive response dog that paws the area. He also testified that the dog was trained in patterns on searching the vehicles, and if he got out of the pattern he would run them back through again. If he gets out of it again, it's a behavioral change. That would indicate an odor response. When questioned by the defense attorney Officer Henderson seemed to be uncertain as to why he ran the canine officer twice. He indicated that it was "just his habit". Nor could he testify as to whether or not his canine partner could indicate Lortab, Oxycodone, Hydrocodone pills. He did testify that his dog was certified by Judge Mendheim as a dog that sits and stares at the area of the odor when he indicates. Once the vehicle was searched, Officer Henderson recovered a pill bottle pushed down in the passenger seat with what was later identified as hydrocodone pills inside it.

Lower Court Proceedings. The Petitioner entered a not guilty plea on January 15, 2008. The Petitioner filed a Motion to Suppress on November 18, 2008 which the court heard on March 3, 2009 and denied the motion. The Petitioner then filed an Alford plea to the charges and preserved his suppression issues

for review. The Petitioner was sentenced to three years imprisonment and subsequent fines, with the sentence being suspended and the Petitioner being placed on three year's probation. The Petitioner filed a Motion to Set Aside the Verdict Judgment and the Motion for a New Trial on which the Trial Court denied on June 11, 2009. The Petitioner then filed a Notice to Appeal to the Alabama Criminal Court of Appeals and the Appeal was denied on December 11, 2009. The Petitioner then filed an Application for a Rehearing which was overruled January 8, 2010. Petitioner then filed a Petition for Writ of Certiorari which was denied with no opinion on March 5, 2010.

REASONS FOR GRANTING THE PETITION

This case raises the important question of whether it is a violation of the Fourth Amendment if evidence obtained through the use of a drug dog is admitted without the state laying a foundation as to the handler's expertise prior to the evidence being admitted. This Court has ruled that during a traffic stop an officer can use the services of a canine officer to determine if there are drugs without violating the individual's rights under the Fourth Amendment. *Illinois v. Caballes,* 543 U.S. 409 (2005). However, the court did not address the issue of whether the state was required to lay a foundation in order for the evidence to be admitted. In this particular case before the court, defense counsel filed a Motion to Suppress prior to trial arguing that the property was

illegally seized through an illegal search. The lower courts ruled that the evidence was not seized during an illegal search. This ruling was affirmed by the Court of Criminal Appeals and the Supreme Court of Alabama.

We would argue that the state must be required to lay a foundation prior to evidence being admitted. We have been unable to find anything in Alabama case law stating the foundation that must be laid for a case involving drugs and the use of a canine officer. However, Alabama has addressed this issue in reference to dog-tracking. For dog - tracking evidence to be admissible, the State must establish the following: the training and reliability of the dog, the qualifications of the person handling the dog, and the circumstances surrounding the tracking by the dog. The foundational evidence need not be overwhelming or specific, but must be sufficient to indicate reliability of the evidence. *Gavin v. State,* 891 So. 2d 972 (Ala. Crim. App. 2003).

The same requirements should be met in a drug case. Otherwise it would be easy to violate a person's rights under the Fourth Amendment especially with the reduced standard of reasonable suspicion in traffic cases. If you analysis the case using the requirement for dog-tracking the first two elements have not been met. Officer Henderson testified that his dog was certified, but no testimony was presented as to the length and/or type of training the canine received and if that training was ongoing. Whether Officer Henderson himself had gone through any type of training to become a drug dog handler. How long Henderson had been a dog

handler? How long he had been assigned to the canine officer (drug dog)? If his testimony is any indication he was not sure as to what his canine partner was suppose to be doing. In one part of his testimony he stated that the dog was a passive indicator and would sit if he found anything. He also testified that the dog had circled the car two times and had indicated on the same spot. However, when he was questioned by the defense as to why he would run the dog two times. He testified that he has "always done that". We also find it interesting that Officer Henderson never mentioned his dog's name, indicating that Officer Henderson may have not known the dog very well. Officer Henderson was unable to also testify to what drugs the canine had been certified to detect? Whether there were any records of false alerts? Was there any training to discourage him from altering to "dead scents" residual odors of drugs that are no longer present? According to the record there is no indication that the dog handler or the dog himself is reliable. Further, we can find no substantiated case law or even canine unit documentation in existence where dogs are trained to detect prescription drugs. Generally, canine units are trained to detect marijuana, cocaine, heroin and methamphetamine which all transmit distinct odors. In cases, where cars have been exposed to or located in an area of "supposed" drug activity, *i.e.*, clubs' parking lots, there lies a high probability of false alerts because of the proximity of cars, people, etc. in constant contact with the outside of the car. It is noted that the canine unit focused on the driver's door on the outside rather than the passenger door where the prescription pills were located.

That brings us to the third element required for laying a foundation for evidence to be admitted and that is the circumstances surrounding the tracking by the dog. There exists little doubt from multiple studies that dogs have the ability to detect the smallest traces of odors and to perceive those odors to a higher degree than humans. But when you are seeking to determine reasonable suspicion, it can become faulty detection. Many times the possibility of a false alert will be overlooked by a handler as will the dog's inability to differentiate between a "live" scent and a "dead" scent. Each dog will also vary in its ability to ignore detractors and masking agents. Max A. Hansen, *United States v. Solis, Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?* 13 Can Diego L. Rev. 410 (1976).

A dog sniff alone should not determine reasonable suspicion for search of a vehicle when there exists no other underlying factors. It has been determined that a call to dispatch was not made, so there had been no information provided to Officer Henderson regarding the existence of any outstanding warrants for the Petitioner. The Petitioner did not speed, did not try to elude the police, exhibited no signs of alcohol or drug use and presented the correct documentation upon request. Further, there has been no reports of certification of dogs sniffing and detecting the various types of prescriptions pills and why should there be. A prescription drug in and of itself is not illegal. It is argued that the Petitioner's apparent possession of it was illegal. But what we argue is not the type of drug inevitably found in the pill bottle, but the method employed to determine that factor. Here we

have a car stopped for nebulous reasons, *i.e.*, reckless driving, but no citation was issued and further dispatch was being notified of the traffic stop. The Officer testified that there was no evidence of the Petitioner losing at any time control of the car and the Officer did not detect any evidence of alcohol or illegal drug nor was loud music playing from the Petitioner's vehicle. After the Officer put on the lights to stop the Petitioner, he immediately pulled over and upon request handed the Officer the requested identification and insurance card. Officer Henderson also indicated that the Petitioner was trying to hide the pill bottle from him by covering it with his hand, but we submit the improbability of that for four reasons: (1) the Petition had time prior to the Officer pulling him over and proceeding to Petitioner's car to knock the pill bottle to the floor, push it down beneath the seats and/or put it on his person; (2) it would have been difficult for the Petitioner to obtain the requested documentation (license and insurance card) and cover the pill bottle at the same time; (3) if the Petitioner had sought to cover the prescription bottle with his hand, given the size of the pill bottle, it would have been improbable for the Officer to determine what the Petitioner was covering with his hand and (4) generally Officers in a traffic stop ask the drivers of the vehicles to allow their hands to remain where they can see them, generally on the steering wheel. We submit that given the Officer's testimony, his scenario does not ring true with traffic stop procedures. If the Petitioner's hands were visually trying to cover something which could have been a weapon, it would have been more reasonable for the Officer to ask the Petitioner to put his hands where he could see them and then ask to see the pill bottle and/or ask the

Petitioner to step from the car for the Officer's protection. Mr. Lightner had just left a very crowded area with high social activity which would warrant many odors permeate his vehicle and lingering. That and the fact the dog sniff was on the opposite side of the car where the prescription bottle was located seems to denote the dog alerted to factors other than the prescription bottle. "Each dog's performance is affected differently by working conditions and its respective attention span. There is also the possibility that the handler may unintentionally or otherwise prompt his dog to alert." *Hansen*, 13 San Diego L. Rev. at 416. The Officer's testimony of the dog's certification did not address the type of drugs upon which the dog had been trained to alert. We have found to date no records indicating that dogs are trained to detect prescription drugs. The dog alerted on the opposite side of the location where the drugs were found and given the fact that the Petitioner had just left an area with highly concentrated social activity, the probability that the dog alert was a false positive is extremely high. Therefore, we submit that the dog's alert could not have given Officer Henderson reasonable suspicion to search under any test. When taking into consideration all the evidence submitted to the trial court it becomes clear that a foundation was not laid prior to the evidence being admitted. This in turn has prejudiced the defendant in that his Fourth Amendment right to illegal search and seizures was violated.

CONCLUSION

Wherefore, we conclude that it is a violation of the Fourth Amendment if evidence obtained through the use of a drug dog is admitted without the state laying a foundation as to the handler's expertise prior to the evidence being admitted.

Respectfully Submitted,

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Counsel for Petitioner
William Lloyd Lightner

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

STATE OF

ALABAMA

March 5, 2010

1090529

Ex parte William Lloyd Lightner. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: William Lloyd Lightner v. State of Alabama) (Houston Circuit Court: CC07-1553; Criminal Appeals : CR-08-1471).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on March 5, 2010:

Writ Denied. No Opinion. Stuart, J. – Cobb, C.J., and Lyons, Bolin, and Murdock, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., **IT IS HEREBY ORDERED** that this Court's judgment in this cause is certified on this date. **IT IS FURTHER ORDERED** that, unless otherwise ordered by this Court or agreed upon by

the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Easdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of records in said Court.

Witness my hand this 5th day of March 2010.

/s/ Robert G. Easdale
Clerk, Supreme Court of Alabama

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

STATE OF

ALABAMA

Lane W. Mann
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January 8, 2010

CR-08-1471
William Lloyd Lightner v. State of Alabama (Appeal from Houston Circuit Court: CC07-1553)

NOTICE

You are hereby notified that on January 8, 2010 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ Lane W. Mann
Lane W. Mann, Clerk
Court of Criminal Appeals

Cc: Hon. Henry D. (Butch) Binford, Circuit Judge
Hon. Carla Woodall, Circuit Clerk
Billy Shaun McGhee, Attorney

Jean Alexandra Therkelsen, Asst. Atty. Gen.
APPENDIX C

REL 12/11/2009

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala. R. App. P. Rule 54(d) states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppels, double jeopardy, or procedural bar."

Court of Criminal Appeals
State of Alabama
Judicial Building, 300 Dexter Avenue
P.O. Box 301555
Montgomery, AL 36130-1555

A KELLI WISE
Presiding Judge
SAMUEL HENRY WELCH
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MEMORANDUM

CR-08-1471

Houston Circuit Court
CC-07-1553

William Lloyd Lightner v. State of Alabama

WINDOM, Judge.

William Lloyd Lightner appeals his guilty plea conviction for unlawful possession of a controlled substance in violation of § 13A-12-212, Ala. Code 1975, and his resulting sentence of three years in prison, suspended to serve 3 years of probation. The circuit court also ordered him to pay a $1000 fee to the victim compensation fund assessment, a $1000 mandatory Drug Demand Act Assessment, and a $100 fee to the Alabama Department of Forensic Sciences Trust Fund.

Prior to pleading guilty, Lightner filed a motion to suppress all statements and evidence seized or obtained by law enforcement. After conducting a hearing on March 30, 2009, the circuit court denied the motion. Lightner reserved the suppression issue for appeal prior to entering his guilty plea.

At the suppression hearing, the State presented testimony from Officer Jamie Henderson, who was employed by the Dothan Police Department as an investigator. At the time of the incident, Officer Henderson was a Canine Officer. Officer Henderson testified that in May, 2007, he was on patrol after midnight in the 200 block of Foster Street in Dothan. He observed Lightner's vehicle coming out of a parking lot at a high rate of speed where a "pile of people were standing". (R. 7).

Upon observing Lightner rev his engine and accelerate past the group of people, Officer Henderson followed the vehicle. Eventually, Officer

Henderson caught up with Lightner's vehicle, activated his emergency equipment, and stopped Lightner for reckless driving. Henderson approached Lightner's vehicle and obtained his driver's license.

While obtaining Lightner's driver's license, Officer Henderson saw a pill bottle on the passenger seat. He also witnessed Lightner put his hand over the bottle. According to Officer Henderson, Lightner kept trying to cover the pill bottle with his hand. At that point, Officer Henderson went back to his patrol car and got his drug dog. After sniffing the vehicle, the dog indicated that there was drugs in Lightner's vehicle. Officer Henderson searched the vehicle and found a pill bottle which had been shoved down between the seats. The pill bottle contained "blue pills" which were later identified as Lortabs. (R. 10). Upon finding the pill bottle, Officer Henderson asked Lightner where Lightner got the pills, and Lightner responded that somebody gave them to him for headaches. Officer Henderson arrested Lightner for possession of a controlled substance.

On appeal, Lightner argues that the circuit court erroneously denied his motion to suppress the evidence seized during the traffic stop. Specifically, Lightner argues that Officer Henderson did not have a reasonable suspicion that a crime had occurred or was about to occur; therefore, the traffic stop was illegal. Lightner further argues that, even if the traffic stop was legal, Officer Henderson did not have probable cause to search his vehicle. We disagree.

To the extent Lightner challenges his initial stop, this issue is without merit. This court has held that "[a] traffic stop is a seizure within the meaning

of the Fourth Amendment." J.T.C. v. State, 990 So. 2d 444, 447 (Ala. Crim. App. 2008) (citing Stone v. City of Huntsville, 656 So. 2d 404 (Ala. Crim. App. 1994). "[B] ecause a routine traffic stop is a limited form of seizure, it is analogous to an investigative detention, and ... therefore ... will be governed by the standard set forth in Terry v. Ohio, 392 U.S. 1. " J.T.C., 990 So. 2d at 447 (quoting United States v. Francis, 140 Fed. Appx. 184, 185 (11th Cir. 2005)). A brief, investigatory detention is proper under Terry if, based on the totality of the circumstances, "the detaining officers ... have a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Corter, 449 U.S. 411, 417-18 (1981). This court has further held that witnessing a traffic violation satisifies the reasonable suspicion standard articulated in Terry. J.T.C., 990 So. 2d at 447 (citing State v. Rodgers, 903 So. 2d 176, 178 (Ala. Crim. App. 2004).

At the suppression hearing, Officer Henderson testified that he witnessed Lightner pull his vehicle out of a parking lot and accelerate past a large group of people at a high rate of speed. Based on this testimony, Officer Henderson had sufficient cause to believe that Lightner had been recklessly driving. § 32-5A-190(a), Ala. Code 1975, ("Any person who drives any vehicle carelessly and heedlessly in willfulor wanton disregard for the rights or safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving."). Therefore, Lightner's challenge to the constitutionality of his initial stop is without merit.

To the extent Lightner challenges the search of his vehicle; this issue is likewise without merit. It is well settled that warrantless searches and seizures are per se unreasonable under the Fourth Amendment unless the State establishes that the search or seizure falls within a recognized exception. Ex parte Hilley, 484 So. 2d 485, 488 (Ala. 1985). One of the recognized exceptions to the warrant requirement is the "automobile exception," which allows law enforcement to search an automobile based on probable cause alone. State v. Black, 987 So. 2d 1177, 1180 (Ala. Crim. Appl. 2006) (citing Maryland v. Dyson, 527 U.S. 465, 466-67 (1999)). Under the "automobile exception" to the warrant requirement, " ' [a] warrantless search of a vehicle is justified where there is probable cause to believe the vehicle contains contraband.' " Harris v. State , 948 So. 2d 583, 587 (Ala. Crim. App. 2006) (quoting Lykes v. State, 709 So. 2d 1335, 1337 (Ala. Crim. App. 1997)).

" ' Probable cause to search a vehicle exists when all the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been or is being committed and the vehicle contains contraband.' " Harris, 948 So. 2d at 587 (quoting State v. Odom, 872 So. 2d 887, 891 (Ala. Crim. App. 2003)). "The level of evidence needed for a finding of probable cause is low." State v. Johnson, 682 So. 2d 385, 387 (Ala. 1996). "In dealing with probable cause ... we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, and legal technicians act ...."

Brinegar v. United States, 338 U.S. 160, 175 (1949). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." Stone v. State, 501 So. 2d 562, 565 (Ala. Crim. App. 1986) (quoting Spinelli v. United States, 393 U.S. 410, 19 (1969)).

At the suppression hearing, Officer Henderson testified that while obtaining Lightner's driver's license, he saw a pill bottle in the passenger's seat and witnessed Lightner trying to hide the bottle with his hand. See State v. Montgomery, 968 So. 2d 543, 551 (Ala. Crim. App. 2006) (holding that "an alert by a trained drug-sniffing dog provides probable cause to search without a warrant."). Based on Lightner's attempt to cover the pill bottle and the drug dog's alert, Officer Henderson had probable cause to search Lightner's vehicle.

Because both the initial stop and subsequent search of Lightner's vehicle were legal, the circuit court properly denied Lightner's motion to suppress. Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Wise, P.J., and Welch, Kellum, and Main, JJ., concur.